ISMAGA BINA SDN. BHD.

v.

GOVINDASAMY A/L VISWALINGA THEVAR

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[ORIGINATING MOTION NO. 25-56-92]
28 OCOTBER 1993

LAND LAW: Private caveat - Whether lessee can remove the caveat - Whether caveator had interest in the land - Interest only in personam - Can whole land be caveated if interest is only in a portion of the land.

The land in question belonged to a society. The society leased the land to the applicant who wanted to sublease it to Mobil. A search of the register document of title, for the purpose of the sublease, revealed that a private caveat had been entered in respect of the land by the respondent.

The respondent was a monthly tenant of a premises built on the said land. The premises belonged to one Abdul Rahim Bin Shaik Madar, a member of the society. Pursuant to an agreement dated 20 July 1981, the respondent vacated the premises for the society to develop the said land in consideration of the society agreeing to sell to the respondent one unit of the shophouses to be constructed. However the society had failed to erect the shophouses. The respondent entered a private caveat on 23 September 1991 to protect his interest arising from the agreement.

Held:

[1] The applicant, as lessee, was stopped dead in its tracks from proceeding with the proposed sublease to Mobil owing to the entry of the caveat on the register document of title to the land. There being no evidence that the applicant's title or interest was defeasible, the respondent's contention that the applicant lacked the necessary *locus standi* was devoid of merit. Further there were no allegations making the title or interest so defeasible as was suggested in the present case. The applicant was, therefore, clearly an aggrieved person or body within the meaning of s. 327 (1) of the National Land Code 1965.

[2] The agreement entered into with the society did not give, nor did it purport to give, the respondent any claim in the land or any right to such title or interest. It only gave the respondent and the society the right to specific performance of the agreement without in any way touching the land in question. The agreement did not reserve to the respondent any right over the land and the civil suit brought by the respondent against the society sought specific performance of the agreement, damages in addition and costs. There is not a whisper of a prayer in the civil suit for the respondent to claim any title to, or interest in, the land. The respondents claim against the society in the civil suit is purely an interest *in personam* and therefore incapable of being caveated.

[3] In the present case, the respondent had the caveat entered in respect of the whole of the land. This he clearly could not do as his interest only extended to the purchase of one unit of shophouse intended to be erected on a part of the land and the caveat could therefore not be expressed to bind the whole of the land. Neither is it the duty of the Court to amend or modify the caveat and restrict its application to the specific interest of the respondent in the land.

[Application allowed. Caveat ordered to be removed. Damages ordered to be assessed].

Cases referred to:

Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(cit)***

Cahya Makmur Holdings (Melaka) Sdn. Bhd. v. Heap Huat Rubber Co. & Anor.[1992] 1 CLJ 399 / [1992] 1 MLJ 201 ***(cit)***

Hew Sook Ying v. Hiw Tin Hee[1992] 3 CLJ 1325 / [1992] 2 MLJ 189 ***(cit)***

Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1990] 1 CLJ 1232 / [1990] 2 MLJ 482 ***(cit)***

Malayan United Finance Bhd. v. Tay Lay Soon [1991] 2 CLJ 899 / [1991] 1 MLJ 504 ***(cit)***

Pegang Bin Bachik v. Abdul Majid Bin Abdul Majid [1985] 2 MLJ 459 ***(cit)***

Dunia Raya Enterprise Sdn. Bhd. v. Ganesan @ Muniandie a / l Irusen @ Erusen [1993] 1 CLJ 196 / [1993] 1 AMR 326 ***(refd)***

Tan Heng Poh v. Tan Boon Thong & Ors. [1992] 3 CLJ 1340 / [1992] 2 MLJ 1 ***(foll)***

Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd. [1992] 1 CLJ 20 / [1992] 1 MLJ 263 ***(cit)***

Kasivisvanathan Chettiar v. Pereira [1976] 2 MLJ 110 ***(cit)***

Inter-Continental Mining Co. Sdn. Bhd. v. Socrete Des Etains De Bayao Tudjuh [1974] 1 MLJ 145 ***(cit)***

Vengadesalam v. Mahadevan & Anor. [1976] 2 MLJ 161 ***(cit)***

Ooi Boon Pak & Ors. v. Teoh Kee Keong [1982] 1 MLJ 299 ***(cit)***

EM Buxtom & Anor. v. Packaging Specialists Sdn. Bhd.[1986] 2 CLJ 241 / [1987] 1 MLJ 342 ***(foll)***

Legislation referred to:
National Land Code 1965, ss. 322, 323, 327, 340

Other sources referred to:
National Land Code: A Commentary, Judith Sihombing, 2nd Edn., pp. 743, 745, 746

For the applicant - Mohd Nor bin Mohamad (Ong Guat Ean with him); M/s. Wong-Chooi & Mohd Nor
For the respondent - Annamalai (Nisha Mohamed with him); M/s. Annamalai & Co.

JUDGMENT

T. Selventhiranathan JC:

The nature of the proceedings

This is an application to remove a private caveat under s. 327 (1) of the National Land Code 1965 ("the Code") entered by the respondent, Govindasamy a/l Viswalinga Thevar, in respect of two pieces of land ("the land") and for damages for failure to remove the caveat after being notified so to do.

The background

The facts are virtually not in dispute. The registered proprietor of the land is a co-operative society, Syarikat Bekerjasama-sama Serbaguna Sungei Glugor Dengan Tanggungan Berhad ("the society"). The society granted a ninety-nine-year lease of the land commencing on 10 November 1981 to the applicant, Ismaga Bina Sdn Bhd, for a consideration of RM703,629. The applicant charged the land to Ban Hin Lee Bank Berhad as security for credit facilities of RM1.7 million on 2 August 1982 and the charges were registered on16 August 1982.

In 1991 the applicant entered into negotiations with Mobil Oil Malaysia Sdn. Bhd ("Mobil") to grant the latter a sublease of the land for the purpose of operating a petrol station. The negotiations cystallised into a firm contract by the offer of a sublease option by the applicant to Mobil and its acceptance by the latter in May-June 1991. The applicant intended to utilise part of the proceeds from the sale of the sublease to discharge its obligation to the bank. For the purpose of the sublease, a search of the register document of title to the land was carried out. It revealed that a private caveat had been entered in respect of the land by the respondent on 23 December 1991.

The search also resulted in the following facts surfacing. The respondent had been a monthly tenant in respect of premises 37 Sungei Glugor, Penang, which had been erected on a part of the land. The premises belonged to one Abdul Rahim bin Shaik Madar, a member of the society, and the respondent had rented the premise from him. The society wanted vacant possession of the land for the purpose of development and in consequence thereof it entered into an agreement with the respondent on 20 July 1981. The salient features of the agreement were as follows:

> The agreement recited that the society was the registered proprietor of the land and that the respondent was a monthly tenant in occupation of the premises erected thereon and which premises belonged to the said Abdul Rahim bin Shaik Madar. It further recited that the society had represented to the tenant that it had plans to develop the land and that it required the portion thereof on which the premises was situated for such development and that the tenant had agreed to deliver peaceful vacant possession of the premises to the society **upon the terms and subject to the conditions hereinafter contained.**
> (emphasis added)

The terms and conditions of the agreement were:

1. In consideration of the society agreeing to sell to the tenant one unit of the shophouses to be constructed on ..... [the land] .... at the price and on the same terms and conditions sold to other purchasers of shophouses to be erected on... [the land] ...., the tenant shall quit and deliver vacant possession of the premises ... to the society on or before the 1st August 1981.
2. Upon vacating the said premises, the society shall provide to the tenant a room in [the] Glugor area free of rental which is fit for occupation until the society office building to be erected... [on a different plot of land] ..., is completed after which the tenant shall occupy a room in the said office building free of rental until such time as the unit of shophouse to be purchased by the tenant is completed.
3. Upon completion of the unit of shophouse agreed to be sold to the tenant, the tenant shall vacate the said room provided by the society in its office building peacefully without any compensation whatsoever.
4. Time shall be of the essence of this agreement.
5. The society and the tenant shall be entitled to specific performance of this agreement.
6. This agreement shall be binding upon the heirs, personal representatives, executors, successors in title and assigns of the society and the tenant respectively.

Pursuant to the agreement, the respondent had given up vacant possession of the premises to the society and the society had provided him with alternative accommodation in a room in its office until, as I am given to understand, the present. However, the society had failed to erect the shophouses on the land and offer for sale one unit to the respondent, as promised under the agreement.

The applicant claimed that it had no knowledge of the agreement entered into between the society and the respondent until the search of the register document of title of the land in connection with the applicant's intention to create a sublease of the land in favour of Mobil was carried out. Only then did it discover that the respondent had entered a private caveat on 23 December 1991. The caveat was based on the respondent's alleged right and interest arising from the agreement entered into in 1981 with the society. It also transpired that the respondent had filed a writ action ("the civil suit") on 12 December 1991 against the society, *inter alia*, for specific performance of the agreement and damages. The applicant was not made a party to that action.

The hearing of this application under s. 327 (1) of the Code commenced on Friday, the 12th March 1993 (after the conclusion of other matters that day) and was adjourned to 27 April 1993. On the latter date, an adjournment was granted as leading counsel for the applicant, Encik Mohd Nor bin Mohamed, was otherwise engaged. At the request of the parties, written submissions were to be put in by specified dates. However, those deadlines were extended at the request of the parties for various reasons and the last written submission reached me on 4 October 1993.

The applicant's case

It was contended on behalf of the applicant that the respondent did not have any caveatable interest in respect of the land. The burden of proving such an interest lay on the respondent as caveator and he had to show that his claim in respect of the land or of interest in the land gave rise to a serious question to be tried. The cases of *Eng Mee Yong and Ors. v. Letchumanan* [1979] 2 MLJ 212, *Cahya Makmur Holding (Melaka) Sdn Bhd v. Heap Huat Rubber Co. Sdn Bhd & Anor.* [1992] 1 MLJ 201, and *Hew Sook Ying v. Hiw Tin Hee* [1992] 2 MLJ 189 were cited in support. It was further argued that the applicant as the registered lessee of the land was in the same position as the registered proprietor: per Edgar Joseph Jr. J. (as he then was) in *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1990] 2 MLJ 482 at page 483 (which holding it was emphasised was not disturbed by the Supreme Court on appeal in *Malayan United Finance Berhad v. Tay Lay Soon* [1991] 1 MLJ 504 at pages 505-506, although the Supreme Court disagreed on other issues, that is, on the issues of priority and equity of redemption).

It was further submitted that the claim by the respondent to enter the caveat did not have any proper basis in that it was based on the agreement which gave the respondent the right to buy one unit in the shophouses which were to be built by the society on the land at a price and upon terms and conditions which were to be the same as those applicable to other buyers. The unit was not identified, its size and other details were not specified, its purchase price was not agreed upon, the period for the performance of the agreement was not specified, and no duty was imposed on the society to build the shophouses. It was clear, therefore, that the agreement was incapable of being enforced: *Abdul Malik bin Abdul Majid v. Asnah bte Hamid and Anor., Dagang bin Bachik v. Abdul Majid bin Abdul Majid* [1985] 2 MLJ 459.

It was also contended that the agreement did not give the respondent any definite right over the land or any interest therein. Therefore, the right of the respondent, even if it existed, was not capable of being identified and in the circumstances could not form the basis of a caveat. Reference was also made to the cases of *Dunia Raya Enterprise Sdn Bhd v. Ganesan @ Muniandie a/l Irusen @ Erusen* [1993] 1 AMR 9:326 and *Tan Heng Poh v. Tan Boon Thong and Ors.* [1992] 2 MLJ 1 in support.

A further contention on behalf of the applicant was that the right of the respondent to enter the caveat, even if it existed, pertained only to a part of the land and gave rise to the following consequences:

(a) as the caveat did not specify that the interest of the respondent was limited to a part of the land, it contravened s. 323 (2) of the Code and was therefore not valid;

(b) however, as the interest of the respondent in relation to the land pertained only to a part thereof, he was not entitled to enter a caveat in respect of the whole of the land.

It was further submitted that even if the respondent had a caveatable interest, which was totally denied, the respondent had to prove that on the balance of convenience it was better to allow the caveat to remain on the basis of *Eng Mee Yong* and *Cahya Makmur*. The factors which had to be considered were as follows:

(a) it could not be denied that the continued existence of the caveat was to the detriment of the applicant;
(b) the inordinate delay on the part of the respondent to take any action against the society as the registered proprietor of the land with regard to the agreement between them was relevant. The respondent did not do anything at all from 1981 until 1989 when he was informed that the land had been leased to the applicant and even then he did not do anything further until he filed the civil suit against the society on12 December 1991, that is after a period of some ten years;
(c) there was uncertainty as to how long the civil suit would take to be heard and concluded. Having regard to the fact that the society as the registered proprietor of the land was disputing the respondent's claim under the agreement in the civil suit and having regard to the weakness of the respondent's case which was based upon the agreement, it was clear that the disposal of the suit would be protracted and this would adversely affect the interest of the applicant which could not be compensated by the respondent.

Having regard to the factors raised above, it was submitted that the Court could not but decide that the caveat should not be allowed to continue and that the Court should order that damages should be assessed and paid by the respondent together with costs.

The respondent's case

Encik Annamalai for the respondent, in his written submission, replied that the society was the landowner and it was affected by the caveat. However, it had not taken any action against the respondent as the caveator. As the applicant under s. 327 of the Code to show cause why the caveat ought to be removed: *Eng Mee Yong* at p. 215 of the report. It was for the applicant to satisfy the court that it was aggrieved by the existence of the caveat. In Encik Annamalai's view:

> The single distinct and unusual feature of this case as compared against all relevant authorities is that the caveator had already commenced legal proceedings vide ... [the civil suit] .... on 12 December 1991 for reliefs against the [society] and the caveator had also applied for summary judgment on 26 September 1992 which is pending hearing. All these were well before the applicant commenced these proceedings and without any prior knowledge of these proceedings.

The respondent had considered adding the applicant as a defendant in the civil suit but had not done so because the applicant's solicitors did not reply to the respondent's solicitors' letter asking what the applicant's interest was in the land and requesting for a copy of the lease agreement between the applicant and the society.

It was contended for the respondent that this claim was based upon the agreement between him and the society

> ....which has been and is being partly performed by the [society] despite the inordinately long delay of twelve years. This executory contract is not in dispute at all.

It was submitted that the respondent had a caveatable interest clearly within the ambit of s. 323(1) of the Code and the case of *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn. Bhd.* [1992] 1 MLJ 263 and the authorities discussed therein were cited in support. The respondent had filed the civil suit for specific performance of his contractual rights under the agreement and the case of *Hew Sook Ying* cited by Counsel for the applicant only reaffirmed the earlier decision in *Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110.

It was Encik Annamalai's submission that the respondent had given valuable consideration and acted in good faith upon the agreement and the society could not take action to remove the caveat (and had not done so) but that the applicant, whose title was in any event inferior to that of the society, sought to deny the caveatable right and interest of the respondent when the respondent's claims filed earlier are pending determination in the civil suit.

In respect of the applicant's contention that the contractual rights and interests of the respondent under the agreement were vague and indefinite and incapable of being specifically performed, Encik Annamalai replied that these were not matters for the applicant to raise but for the society to assert in the civil suit and to be determined in the suit and not in these proceedings. In his view the case of *Inter-Continental*

Mining Co. Sdn Bhd v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 was relevant. The respondent and the society were parties to the agreement and they knew and understood what they were doing, and they had been acting upon it. According to Encik Annamalai, the society had clearly stated in its defence in the civil suit, and in the affidavit in reply to the application for summary judgment in the civil suit, that the applicant in the present case is liable for the delay and the breach by the society of its contractual obligations.

As to the applicant's contention that the respondent's right, if it existed at all, was only to a small portion of the entire land, Encik Annamalai replied that the respondent had disclosed his rights and interest clearly in his statutory declaration when applying for the caveat and this was sufficient on the basis of *N. Vengadasalam v. Mahadevan and Anor.* [1976] 2 MLJ 161. If for any reason it was deemed necessary to restrict and specify the interest of the respondent, which it was submitted was not possible on the facts of the present case due to the delay and default of the applicant in relation to the society, the Court could direct an amendment of the caveat on the basis of *Ooi Boon Pak and Others v Teoh Keong* [1982] 1 MLJ 299.

Encik Annamalai then dealt with certain aspects of the present case which had only come to be known after the affidavits by the applicant were filed. He contended that the applicant entered into the lease agreement with the society with full knowledge of the existence of the respondent as a tenant on the land. The respondent on his part had fulfilled all his obligations under the agreement with the society and this was confirmed by the latter. The respondent did not and could not have had any prior knowledge of any dealings between the society and the applicant and the respondent only became aware of the lease granted to the applicant in 1989 and confirmed in 1991 when his solicitors carried out a search.

Encik Annamalai contended that the respondent had lodged the caveat as his claims and rights to the one unit in the shophouses to be built on the land appeared to be in jeopardy. From 1981 to 1989, the respondent had trusted the society to perform its obligations and after learning of the lease to the applicant in 1989, he had become more concerned. He lodged the caveat in 1991 when it was clear that no building works whatsoever had commenced on the land, that there were charges for a total sum of RM1.7 million, that another private caveat had been entered, and that the applicant intended to create a sublease in favour of Mobil. All these showed that the respondent's rights to his shophouse were in real danger and hence he had filed the civil suit against the society and lodged the private caveat in respect of the land. He was entitled to maintain the caveat until the final determination of the suit which, in Counsel's view, was not frivolous or implausible. It was a serious action which was being earnestly pursued as was clearly evident from the respondent's affidavit in support of the application for summary judgment in the suit. There were "strong merits" in the application for summary judgment in the suit and a serious question to be tried. Learned Counsel therefore prayed for the application for the removal of the caveat to be dismissed with costs.

Consideration of the issues, the law and the facts, and findings thereon

The private caveat was entered on the register document of title to the land based on the agreement between the respondent and the society entered into on 20 July 1981, the terms and conditions of which have been set out earlier in this judgment in detail. The question for answer here is whether that agreement gave the respondent a caveatable interest in the land so as to bring him within the category of persons and bodies at whose instance a private caveat may be entered pursuant to subsection (1) of s. 323 of the Code. Subsections (1) and (2) of that section provide as follows:

> (1) The person or bodies at whose instance a private caveat may be entered are -
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).
>
> (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s. 211 and shall state therein the nature of the claim on which his application is based, and

whether the caveat is to be expressed to bind the land itself or a particular interest only.

Section 322 specifies the nature and effect of private caveats and needs to be set out in full to appreciate the ensuing consequences of the entry of a private caveat on the register documents of title to land:

(1) A caveat under this section shall be known as a 'private caveat', and -

(a) may be entered by the registrar on the register document of title to any land at the instance of any of the persons or bodies specified in s. 323;
(b) shall have the effect specified in subsections (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein:

Provided that such a caveat shall not be capable of being entered in respect of a part of the land.

(2) The effect of any private caveat expressed to bind the land itself shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of-

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
(c) any lien holder's caveat in respect thereof.

(3) The effect of any private caveat expressed to bind a particular interest only shall, subject to subsections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of -

(a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto);
(b) where that interest is a lease or sublease-

(i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and
(ii) any lien-holder's caveat in respect thereof.

(4) A private caveat shall not prohibit the registration, endorsement or entry of any instrument, claim or lien-holder's caveat where the instrument was presented, or the application for entry received, prior to the time from which the private caveat takes effect.

(5) A private caveat shall not prohibit the registration or endorsement of any instrument or claim where -

(a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or
(b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement.

(6) Where the registration of any instrument, or the endorsement or entry of any claim or lienholder's caveat is prohibited by any private caveat, the registrar shall reject the instrument or, as the case may be, application for endorsement or entry.

(7) On rejecting any instrument or application for endorsement pursuant to this section, the registrar shall take the like steps as if he had rejected it pursuant to s. 298 or, as the case may be, 317.

In the present case, the applicant contended that the onus of proving that the respondent had a caveatable interest within the meaning of the Code lay on the respondent while the latter contended that, as the applicant was not the landowner, the onus was upon it under s. 327 of the Code to show cause why the caveat ought to be removed. To my mind, this is a matter of semantics entailing different ways of looking at the same coin.

By s. 327 (1) of the Code, any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just. The application for the removal of the private caveat in the present case was made by the applicant which contended that the caveat should be removed as the respondent was not within the category of persons or bodies at whose instance a private caveat may be entered pursuant to s. 323 (1) of the Code. Once the applicant was able to establish this, i.e. that the respondent was not within that category of persons or bodies and he would not be within that category if he had no caveatable interest, then the applicant is entitled to have the caveat removed and the entry thereof on the register document of title cancelled pursuant to s. 327 (2) of the Code. However, before it could proceed to so prove, the applicant had to show that it had

the necessary *locus standi* to make the application for the removal of the caveat by virtue of being a person or body aggrieved by the existence of the caveat. It was contended on behalf of the respondent, not directly but obliquely, that the applicant lacked the necessary *locus standi* as it was only a lessee of the land, *albeit* for a lease of ninety-nine years, and that the proper person or body to make the application should be the society in its capacity as the landowner.

With respect, this oblique contention is devoid of merit. The applicant, as lessee, was stopped dead in its tracks from proceeding with the proposed sublease to Mobil owing to the entry of the caveat on the register document of title to the land: see s. 322 of the Code reproduced above for the nature and effect of the private caveats. In addition, by subsection (1) of s. 340 of the Code, the title or interst of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered shall be indefeasible, subject to the other provisions of that section which make the title or interest defeasible only where there has been fraud, misrepresentation, forgery and the like in the circumstances specified in subsection (2). No such allegation making the title or interest so defeasible was suggested in the present case. The applicant was, therefore, clearly and aggrieved person or body within the meaning of s. 327 (1) of the Code. Conversely , the respondent, by questioning the *locus standi* of the applicant, was hoisted with his own petard in that if it was argued that the applicant as a ninety-nine-year lessee of the land was not a person or body aggrieved by the entry of the caveat which prevented if from dealing with the land, how could the respondent pretend to have a caveatable interest?

The agreement between the respondent and the society whereby, in consideration of the respondent giving up vacant possession of the premises on the land, the society undertook to sell him one unit of shophouse at the same price as it would sell to other purchasers of the shophouses which it intended to construct on the land and, pending such construction, to provide the respondent with free accommodation, did not, in my view, make the respondent a person claiming title to, or any registrable interest in, the land concerned, or claiming any right to such title or interest within the meaning of paragraph (a) of subsection (1) of s. 323 of the Code, the other paragraphs of that subsection being not relevant in the present case. The agreement entered into with the society did not give, nor did it purport to give, the respondent any claim to the title to the land, or any registrable interest in the land, or any right to such title or interest. It only gave the respondent and the society the right to specific performance of the agreement without in any way touching the land in question. The agreement did not reserve to the respondent any right over the land and the civil suit brought by the respondent against the society sought specific performance of the agreement, damages in addition to or in lieu of specific performance, injunction and costs. The reference to the injunction in the civil suit is a bare one and does not purport to say what action of the society is being sought to be injuncted. However assuming the best possible scenario for the respondent, event if the respondent were to succeed in the civil suit in obtaining specific performance of the agreement, all he would have is a right to purchase one unit of shophouse from among the shophouses the society was yet to build, or damages or both. There is not a whisper of a prayer in the civil suit for the respondent to claim any title to, or interest in, the land. The respondent's claim against the society in the civil suit is purely an interest *in personam* and therefore incapable of being caveated.

In *EM Buxton and Anor. v. Packaging Specialists Sdn. Bhd.* [1987] 1 MLJ 342, Siti Norma Yaakob J. enunciated on a claim *in personam* at page 344 of the report thus:

> The facts before me are quite different. To begin with, it is not a loan transaction but the sale and purchase of property. The caveat was lodged after the respondent discovered that the area of the property he was to purchase would be greatly reduced by the intended acquisition of the land by Dewan Bandaraya and to protect its interest under the agreement, it lodged the caveat and subsequently filed a civil suit against the applicants seeking a refund of the deposit paid to account and other sums alleged to have been incurred. It is not claiming specific performance of the agreement and by so doing, the respondent has clearly shown an intention that it was no longer interested in purchasing the property but only to seek a refund of the deposit and other expenses incurred. To the end, it cannot be said that it had any interest in the land and since the respondent has demonstrated that it was no

longer interested to acquire such interest, it cannot insist that the caveat be allowed to remain. From the nature of its civil suit, the respondent has only a claim *in personam* against the applicants for which a caveat is not the proper remedy as a means of protecting such a claim. Admittedly, such a claim originated from the agreement but it is not capable of being registered under our Torrens system of registration. It is simply a claim for an unsecured debt and for this very reason, I allow this application in terms of prayers 1 to 3 of this originating motion ....

Similarly, the claim which the respondent has against the society in the civil suit is purely an interest *in personam* and not capable of being registered under the Code. As Judith Sihombing comments in her book **National Land Code: A Commentary** (2nd Edn.) on subsection (1) of s. 323 of the Code at p. 743, as culled from the authorities:

Subsection (1)

The persons or bodies

The private caveat procedure is designed to protect a registrable interest or a right to such interest. Thus the only parties able to caveat are those who may effect dealings with land or interests with land under the Code: ss. 43; 215 (2). If the caveat is entered by a person or body outside of these, the caveat may not be retained on title even though in other circumstances the claim would represent a caveatable claim.

Paragraph (a)

Title ... or registrable interest

A registrable interest is one which gives its holder an immediate right to have a substantive entry made on the register, that is, registration; for example the purchaser of land, who has paid all purchase money, received a transfer in registrable form, and the issue document of title is registrable. The words

(1) `title .... in alienated land' refer to the statutory or legal estate and illustrate that the claimant expects to become the proprietor of the land on completion of the transaction behind the caveated claim;

(2) **`registrable interest in .... alienated land' refer to the obtaining of a registered interest, for example a lease or a charge, which the caveator expects to hold on completion of the transaction behind the caveated claim. This interest must be one which is recognized by the Code as capable of being registered to produce a statutory interest.**
(emphasis added)

Special provision is made for those interests which are not capable of being registered. For example, the lien is able to be protected by entry of the lien-holder's caveat. The tenancy exempt from registration is able to be protected by endorsement of the tenancy on the register document of title.

In applying to enter the private caveat in respect of the party claiming title or a registrable interst, the applicant should be able to show that his interest has resulted from entry into a valid and enforceable contract. The applicant is in the position of having an immediate right to registration but for some reason does not at this time go ahead and register.

Again at pages 745 - 746 she has this to say:

To be caveatable these claims [i.e. any claim of right to title or registrable interest] must represent claims that can lead to the making of a substantive entry on the register, either because the interest will become registrable or because it is one for which enquitable relief by way of specific performance can be sought to enable ultimate registration.

If the claim does not represent a transaction capable of registration then the claim is **not** caveatable for the caveat procedure:

> is an *interim* procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument.

(*Miller v. Minister of Mines* [1963] AC 484 at page 487).

It is axiomatic that a personal claim, enforceable only against the registered proprietor but not the land, cannot be caveated (emphasis added). Thus there is a distinction between an *in personam* interest which is purely personal and which cannot by Court relief bind the land, and between an *in rem* or *in personam* and *ad rem* interest which can bind the land without the need to resort to court assistance: *Bachan Sing v. Mahinder Kaur* [1956] MLJ 97.

.... in *Tan Shiang Shong v. Tan Lee Choon and Anor.* [1985] 2 MLJ 369, beneficiaries of an estate agreed to transfer/exchange land but no formal contract was executed, no purchase money was paid, nor was possession of the land given. However, the extracts of title were handed over. The transferee/beneficiary

then sought specific performance 21 years later. The question for the Supreme Court was whether limitations had barred not only the remedy but also the right to possession of the land. Syed Agil Barakbah SCJ (delivering the judgment of the court) said that upon completion of a valid contract a purchaser in *Bachan Singh's* case had:

> a right *ad rem* or *in personam* to the land. In so far as the vendor is concerned, he is entitled to have it created into a real right. That is possible because every condition in the agreement has been fulfilled in particular payment of the purchase price and taking possession of the land, leaving only the condition to have the land transferred to the purchaser under the Land Code that remained to be done. In our view, that is an equitable right ....
>
> [But here] the appellant had not acquired any equitable interest in the said land, that is, a right *ad rem* which would have entitled him to convert to a real right or right *in rem* by registration of the title deeds in his name under the Code. All that the appellant had was a remedy *ex contractu* to sue the respondents for breach of contract. It is that remedy which was barred by s. 9 (1) of the Limitation Act. In contrast with *Bachan Singh's* case, this is a claim based on a contract and not under s. 417 of the National Land Code. [at page 372]

Thus, the *in personam* and *ad rem* right can be caveated because it is recognized within the hierarch as potentially registrable; **however, the *in personam* interest cannot be caveated for it will never be registrable.** (emphasis added)

The further contention on behalf of the applicant that even if the respondent had a caveatable interest, which was denied, the caveat could not be entered in respect of the whole land, was validly made. This is because the respondent's purported claim under the agreement was to be sold one unit from among the shophouses which were to be built on the land. Even if his claim was sustainable, it would only relate to that part of the land on which the shophouse was to be erected and not to the whole of the land. In the present case, the respondent had had the caveat entered in respect of the whole of the land. This he clearly could not do as his interest only extended to the purchase of one unit of shophouse intended to be erected on a part of the land and the caveat could therefore not be expressed to bind the whole of the land. Neither is it the duty of the Court now to amend or modify the caveat and restrict its application to the specific interest of the respondent in the land, as suggested by Encik Annamalai. This is clear from the decision of the Supreme Court in *Tan Heng Poh v. Tan Boon Thong and Ors.* [1992] 2 MLJ 1 where Mohamed Azmi SCJ had this to say at page 5-6 of the report:

> Section 323 (2) expressly requires, firstly, that Form 19B should be used, and secondly, that the caveator must specify therein not only the nature of the claim on which his application is based but also to state expressly whether the caveat is to bind the land or a particular interest only. In our view noncompliance with these requirements may be fatal and may be a valid ground for removing a caveat at the instance of the applicant.
>
> At p. 82 of the appeal record, the Form 19B read with the statutory declaration showed that whilst the appellant did sufficiently particularize the nature of his claim on which his application was based, he ought to have expressly specified that the caveat was intended to bind only his limited interest in the eight parcels of land and not the whole land. In our view the caveat contained a serious defect in failing to comply with the requirement of s. 323 (2). There is a clear distinction in the effect of a caveat expressed to bind the land itself under s. 322 (2) and one to bind a particular interest only under s. 322 (3). The question may therefore be asked that if you have only a limited caveatable claim or interest in the land, how can you caveat the whole land?
>
> The main ratio of the judgment of this Court in *Mosbert Bhd (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446 is to the effect that once a caveat is shown to be defective, it is no duty of the court to save it by amendment. In relation to the power of the court to order remedial affidavit to be filed for the purpose of s. 417 of the Code, Seah SCJ had this to say at page 448:
>
> It is plain that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to private Lot No. 460 only. In our opinion, subsection (2) does not empower the High Court to make such an order. The section is of limited application only and is intended to authorize the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the court affecting the land. It does not, in our judgment, give power to the Court to allow a defective or void private

caveat to be amended by the caveator . For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one. This matter appears to have been dealt with in detail by the Privy Council in the case of *Eng Mee Yong and Ors. v. Letchumanan* [1979] 2 MLJ 212 and at page 214 Lord Diplock said:

> Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

Since the entry of a caveat was a blot on the title, we agreed with the view that once the caveat was found to be legally unsustainable, that should be the end of the matter, and the caveatee was entitled to have the caveat removed where the caveator's claim was baseless, frivoulous or vexatious.

In the statutory declaration in support of this application to enter the caveat, the respondent stated that he was:

> to be provided with **one unit of shophouse** (emphasis added) to be constructed by the [society] by sale at the price and on the same terms and conditions as sold to other purchasers of shophouses to be erected by the [society on the land in question].

It is therefore abundantly clear that the caveatable interest of the respondent, even if it existed, could not extend to the whole of the land. As the proviso to subsection (1) of s. 322 of the Code prohibits a private caveat from being capable of being entered in respect of a part of any land, it would appear the respondent decided to have it entered in respect of the whole of the land, notwithstanding his limited interest. This he could not do for reasons clearly enunciated by Mohamed Azmi SCJ in *Tan Heng Poh* at pp. 8-9 of the report:

> The other question that arose was that even if there had been no trust for conversion, could a person who was only interested in a specific portion of land enter a caveat against the land, having regard to the new proviso to s. 322 (1) of the Code? With effect from 25 March 1985, a proviso has been added by Act A587 which provides: 'Provided that such a caveat shall not be capable of being entered in respect of a part of the land'.

In concluding his judgment in *Mosbert's* case Seah SCJ, in referring to the new amendment observed at page 449 that the judgment of the Court dealing with the private caveat 'would now seem to be of academic interest only'. We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited only to that specific portion.

In our view the new proviso in s. 322 (1) had indeed affected the judgment of the Federal Court in *N. Vangedaselam v. Mahadevan & Anor*. [1976] 2 MLJ 161. With the greatest of respect, the learned Lord President had correctly stated the law as it stood, at page 163:

> .... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion, you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under s. 322 is now subject to an omnibus proviso that such a caveat shall not be capable of being entered in respect of a part of the land. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under s. 323 (1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s. 323 (1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself. The legal position prior to *Vangedaselam* would now appear to be authoritative, which means that a person who is interested only in a specific portion of land cannot enter a caveat against the land (see *Tee Chin Yong v. Ernest Jeff* [1963] MLJ 118, *Woo Yok Wan v. Loo Pek Chee* [1975] 1 MLJ 156 and *Pok Kew Chai v. Yeoh Thian Seng and Anor*. [1975] 1 MLJ 220). For the purpose of entry and registration, a private caveat

should bind the whole alienated land or the whole registrable interest in the said land. If a person claimed only a limited title or interest in the alienated land, then his caveatable claim would be caught by the new proviso to s. 322 (1). Thus, the present application for caveat under s. 323 (1) (b) could only have been entered and continued if the caveator's claim to be beneficially entitled under the trust affecting the title or registrable interest had related to the whole land but not otherwise.

Under s. 323 (1) of the Code, we are of the opinion that since there was a trust for conversion in the will, and the appellant being a residuary beneficiary in the deceased's estate, the administration of which was still incomplete, he had no caveatable claim to title or registrable interest in the eight parcels of land. We are also of the opinion that being entitled to only a one-sixth share, the caveat was not capable of being registered by virtue of the new proviso to s. 322 (1) of the Code as it would be binding in respect of only part of the alienated land, and the proviso cannot be circumvented by a defective Form 19B.

It is crystal clear from the lucid judgment in *Tan Heng Poh* that the appellant who was the beneficiary of a one-sixth share in the estate of his late father under a will was even then unable to enter and sustain a private caveat under s. 323 of the Code on all the eight parcels of land in the estate on the basis that he was beneficially entitled to them because of failure to comply with the requirement of s. 323 (2) of the Code, as it was not expressly specified that the caveat was intended to bind only his limited interest in the eight parcels of land and not the whole land. If the claim to enter a private caveat under s. 323 of the Code did not avail the appellant in *Tan Heng Poh* who was a beneficiary of the eight parcels of land in question, I fail to see how that section can possibly be utilised by the respondent in the present case to claim a caveatable interest pursuant to the agreement between him and the society. It was clear that the respondent's caveat contained a serious defect in failing to comply with the requirement of s. 323(2) of the Code as it was not expressly specified that the caveat was intended to bind only his so-called limited interest in the land and not the whole of the land.

It is my view that the caveat entered by the respondent is wholly unsustainable in law and I therefore make an order under s. 327(1) of the Code for its removal forthwith. I also order that the respondent pay to the applicant damages arising from the entering and continuation of the caveat in respect of the land. Such damages are to be assessed by the Senior Assistant Registrar from the date the respondent was given notice to have the caveat withdrawn. The respondent shall pay the applicant the taxed costs of this application.